Supreme Court, U.S.
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No. ——

In The

Supreme Court of the United States

October Term, 1996

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Was Defendant Rapanos properly invoking the Fourth Amendment warrant requirement when he refused to allow employees of the Michigan Department of Natural Resources to enter and inspect property undergoing development where the state employees intended to conduct a wetland determination of the property?

Can the Government, suspecting the violation of an environmental regulation, ignore locked gates or fences and enter onto property to conduct unrestricted and unlimited data and sample gathering without a search warrant?

LIST OF PARTIES

United States of America, Respondent

John A. Rapanos, Petitioner

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Order of the United States Court of Appeals for the Sixth Circuit of August 4, 1997 Denying Defendant Rapanos' Petition for Rehearing with Suggestion that case be heard en banc, Sixth Circuit File No. 95-2169. (App. p. 30)

Memorandum, Opinion and Order, August 3, 1995, *United States of America v. John A. Rapanos,* United States District Court Eastern District of Michigan Southern Division, 93-CR-20023-DT, *United States v. Rapanos,* 895 F. Supp. 165 (E.D. Mich., 1995) (App. p. 31)

Opinion and Order denying Plaintiff's Motion for Reconsideration, September 20, 1995, *United States of America v. John A. Rapanos,* United States District Court Eastern District Court of Michigan Southern Division, Case No. 93-CR-20023-DT, Record Entry No. 202 (App. p. 42)

CONCISE STATEMENT OF BASIS FOR JURISDICTION.

(i) The Opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was decided and filed May 28, 1997.

(ii) The Order of the United States Court of Appeals for the Sixth Circuit denying

Defendant Rapanos' Petition for Rehearing with suggestion that the case be heard en banc was filed August 4, 1997.

(iii) This matter does not involve a cross-petition for a writ of certiorari.

(iv) 28 U.S.C. § 1254(1) provides that cases in the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition for any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONCISE STATEMENT OF THE CASE

On August 22, 1989, five Department of Natural Resource officials "knowledgeable in plants and soils" (App. pp. 24-45) met the Petitioner John Rapanos at the boundary of his property and requested entry for the purpose of making a wetlands determination. Rapanos refused to allow the DNR officials onto the property without a search warrant. Rapanos was unaware of the

meeting until he was told at the last minute to meet some DNR people. (App. p. 62)

The only access to the Salzburg property was through a locked gate (App. p. 61). DNR employee Harrington testified to the presence of a highway right-of-way fence around the perimeter of the property. (App. p. 47) With US10 to the north and M47 to the east, both limited access of expressways, those sides of the property were fenced. Aerial photographs demonstrate that the Salzburg parcel is landlocked by limited access highways and surrounding parcels, except for the southern tip of the parcel touching on Salzburg Road, and one side of a 40 acre parcel extending to Flajole Road to the west. (App. p. 65)

By December of 1988, the land had been cleared, bulldozed, and a large hedgerow, up to ten feet high, running the entire length of the property, consisting of cleared trees, brush and dirt had been created. (App. pp. 60, 61)

The Government argued that over $300,000 had been spent by Rapanos in developing the property, and that the land had been cleared to create a shopping mall. (App. p. 64)

MDNR employee Hal Harrington testified that when he met with Rapanos on the Salzburg site on August 22, 1989, "I asked him if we could get on-site to do a **wetlands evaluation**, and he said, no, you cannot get on site,. . . . " (App. p. 46) (emphasis added) Harrington testified that "we had people there that were knowledgeable in plants and soils." (App. p. 46) Harrington also testified that he met Rapanos on site again on August 30, 1989, and again asked Rapanos if the DNR could get on

the site "to do a wetlands evaluation." (App. p. 46) Steve Spencer of the DNR testified "we had intended on doing a **wetland determination** at the time of the meeting." (App. p. 48) Peg Bostwick from the DNR testified that Rapanos was "unwilling to accept any **delineation** or mapping of wetland boundaries on the property by our staff." (App. p. 56, 57) (emphasis added)

There are three components of wetlands recognized in the Corps of Engineers Wetland Delineation Manual: hydric soils, hydrophytic vegetation and hydrology. (App. p. 58). To test for hydric soil, the color and characteristics of the soil under the "A" horizon, which is under the surface, is examined. (App. pp. 50-53) To test for hydrology, the water level in soil pits is gauged, and the soil saturation under the surface is measured. (App. p. 55)

After Rapanos refused to consent to a Government's search on August 22, 1989, the government obtained a search warrant and entered the Salzburg property on November 9, 1989, seizing 35 soil samples (App. p. 18) and 53 plant specimens. (App. p. 59)

In the first trial, which ended in a mistrial, the Government's first witness testified concerning Rapanos' refusal to consent to search. Upon defense objection, the district court requested briefs on the issue, and ruled that the testimony was admissible. (App. p. 6)

In the second trial, the Government engaged in cross-examination of the Defendant concerning his refusal to consent to search on August 22, 1989, whether the Defendant was practicing concealment by his refusal to consent

to search, and why he did not disregard his attorney's advice not to consent to search. (App. pp. 34, 35)

The Defendant was convicted of filling wetlands. The district court granted Defendant a new trial holding that the Government's cross-examination of the Defendant concerning his refusal to consent to the MDNR's entry as plain error. (App. pp. 31-41)

The district judge concluded, after viewing the entirety of the trial, that a reasonable jury could have rendered either verdict. The district judge noted that at one point the jury returned a note indicating they were deadlocked, and concluded that the unchecked prejudicial comments may indeed have tipped the scales in favor of conviction. (App. 41)

The Sixth Circuit Court of Appeals, one Judge dissenting, found that the property in issue should be considered open fields. (App. pp. 1-29) The Sixth Circuit's opinion held that fact that the property was surrounded by a fence, or that entry onto land could only be made through a locked gate, or that the land had undergone extensive alteration and development for one economic purpose or another and was "commercial property" has no bearing on whether the property is open fields. (App. p. 14) Circuit Judge Nelson, in his dissenting opinion, noted:

> Mr. Rapanos and his lawyer undoubtedly understood that the work which the DNR expected to perform on the Salzburg Road property would entail the collection of a significant quantity of physical evidence. (App. p. 25)

* * *

It was not just a cursory inspection for which consent was being withheld. (There had been many such inspections already, of course.) Rapanos and his lawyer must have known that the DNR officials wanted physical evidence – the taking of soil samples had been discussed as early as March 16, it will be recalled, in the presence of Lawyer Allen – and Rapanos and Allen were insisting that the officials get a search warrant before entering the property. (App. p. 26)

Judge Nelson's dissenting opinion goes on to state:

The open fields doctrine does not give the Government *carte blanche* to mine evidence from beneath the surface of the fields. Yet here the Jury heard extensive testimony about the taking of soil borings, and the jury could fairly have inferred that this was one of the things to which Mr. Rapanos and his lawyer were unwilling to agree. I have no doubt that Judge Zatkoff drew such an inference. (App. p. 27)

ARGUMENT

I. ENTRY ONTO PREMISES FOR REGULATORY INSPECTIONS CANNOT BE RESOLVED BY THE "OPEN FIELDS" DOCTRINE.

A. REFUSAL OF ENTRY ONTO PROPERTY FOR A REGULATORY INSPECTION IS PROTECTED UNDER THE FOURTH AMENDMENT

Case law extending Fourth Amendment protection to commercial property and stripping open fields of Fourth Amendment protection has developed separately and in different contexts.

By applying the "open fields" analysis of *Oliver v. United States,* 466 U.S. 170; 104 S.Ct. 1735; 80 L.Ed.2d 214 (1984) to a regulatory inspection the Sixth Circuit's opinion virtually eliminates the warrant requirement for regulatory searches outside of enclosed structures, and would allow government regulators to climb the eight foot fences noted in *Dow Chemical Company v. United States,* 476 U.S. 227; 106 S.Ct. 1819; 90 L.Ed.2d 226 (1986) and enter the premises to conduct warrantless regulatory inspections.

Dow Chemical dealt with the question of aerial photography of a commercial site without physical entry. The *Dow Chemical* opinion stated that "any physical entry by EPA into any enclosed area would raise significantly different questions. . . . " 476 U.S. at p. 237; 106 S.Ct. at p. 1826. The present case is the *Dow Chemical* case with physical entry.

Physical entry in *Dow Chemical* would have been "significantly different" from the entry approved in *Oliver v. United States, supra,* because of two factual distinctions: the commercial nature of the *Dow Chemical* property and the refusal by *Dow Chemical* officials to allow entry. *Dow Chemical v. United States,* 476 U.S. at p. 229; 106 S.Ct. at p. 1822. The government officials in both *Oliver* and *Dow Chemical* were faced with fenced enclosures and "no trespassing" signs. The subjective expectation of privacy was the same in both cases. In *Marshall v. Barlow's, Inc.,* 436 U.S. 307; 98 S.Ct. 1816; 56 L.Ed. 305 (1978) "the critical fact" was that "entry over Mr. Barlow's objection is being sought by a Government agent." 436 U.S. at 314, 98 S.Ct. at 1821. The lack of consent to a regulatory inspection has constitutional significance.

Although the *Dow Chemical* opinion is framed in terms of the open fields doctrine, in *Florida v. Riley,* 488 U.S. 445; 101 S.Ct. 693; 102 L.Ed.2d 835 (1989), identical aerial surveillance of the curtilage of a house was held permissible. Thus, the open fields doctrine was not essential to the *Dow Chemical Company* decision, and the significant difference that physical entry would have made in that case is due to the property owner's refusal to consent to a regulatory inspection of a commercial premises.

The case cited as the origin of the open fields doctrine, *Hester v. United States,* 265 U.S. 57; 44 S.Ct. 445; 68 L.Ed. 898 (1924) cites **4 Blackstone's Commentaries** 223, 225, 226, as its only authority to exempting open fields from the Fourth Amendment. (265 U.S. at 59; 44 S.Ct. at 446) However, the Blackstone cite is helpful only for Fourth Amendment purposes in defining the extent of the curtilage of a house, which would include areas into

which burglary would be "attended with the same circumstances of midnight terror." **4 Blackstone's Commentaries,** 225. The "midnight terror" of common law house burglary has no application to commercial property although the Fourth Amendment clearly applies to such properties. The *Hester* open fields concept, based on an abandoned jug of moonshine lying in an unoccupied and undeveloped field, can not be applied so as to strip all "out-of-doors" commercial property of Fourth Amendment protection.

The opinion of the Sixth Circuit below conflicts with the decision of the Seventh Circuit in *United States v. Swart,* 679 F.2d 698 (CA 7, 1982) In *Swart,* the Seventh Circuit concluded that where an employee of the business denied entry to police officers, the officers "had no reason to believe there was a general invitation to enter the premises," (*Idem,* at p. 702) although the business was open and the vehicles inspected were in an area generally open to the public.

The Court in *Swart* observed that a search in an open field would not necessarily be legal since, under *Katz v. United States,* 389 U.S. 347; 88 S.Ct. 507; 19 L.Ed.2d 576 (1976), the location of a search does not provide a "talismanic solution to every Fourth Amendment problem." 389 U.S. at 351, n.9, 88 S.Ct. at 511, n.9. This Court in *Dow Chemical v. United States,* 476 U.S. at 239; 106 S.Ct. at 1827, n.7 observed that its holding did not reach the issues raised in *Swart,* noting that *Swart* "involved actual physical entry."

Thus, although "what is observable by the public is observable without a warrant by the Government inspector as well" *Marshall v. Barlow's, Inc.*, 436 U.S. at 315; 98 S.Ct. at 1822, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. at 351; 88 S.Ct. at 511. When the land owner has excluded the public, as both Dow Chemical and John Rapanos had done, what the government wanted to see was not "observable by the public" and equally not accessible to the government without a warrant.

B. PROPERTY UNDERGOING DEVELOPMENT IS NOT AN "UNOCCUPIED OR UNDEVELOPED" OPEN FIELD UNDER *OLIVER*.

The open fields doctrine of *Oliver* applies to "open and *unoccupied*" fields (466 U.S. at 179, 104 S.Ct. at 1742, fn. 10) (emphasis added) or "*unoccupied* or *undeveloped* areas" (*Idem*, 466 U.S. at 180, 104 S.Ct. at 1742, fn. 11) (emphasis added), see also *United States v. Dunn*, 480 U.S. 294, 304; 107 S.Ct. 1134, 1141; 94 L.Ed.2d 325 (1987). In *Oliver* although the police were initially hailed by an occupant, when the police identified themselves the occupant vanished. In *Dow Chemical* there was extensive commercial development within the fences. Rapanos' Salzburg parcel was neither unoccupied, since the occupant, Rapanos, told the state officials to leave, nor undeveloped, since it was the areas of disturbance that the MDNR wanted to inspect.

The exclusion in *Oliver* of open fields from the Fourth Amendment based on a literal reading of the language of

the Amendment, and the inclusion in *Dow Chemical* within the Fourth Amendment of enclosed commercial property, has been referred to as an "enigma." *United States v. VanDamme*, 48 F.3d 461, 465 (CA 9, 1995). To harmonize with the *Katz v. United States, supra*, formulation of "reasonable expectation of privacy," the *Oliver* language of "unoccupied" or "undeveloped" fields indicates that the owner of property that has become commercial due to development, and is occupied by the developer, has a reasonable expectation of privacy.

C. TRESPASS ONTO OCCUPIED PROPERTY REMAINS A FACTOR IN FOURTH AMENDMENT ANALYSIS

Katz v. United States, supra, held that the "trespass" doctrine of *Olmstead v. United States*, 277 U.S. 438; 48 S.Ct. 564, 72 L.Ed. 944 (1928) was no longer controlling. While *Olmstead* noted that a conversation obtained by wiretap involved "no entry of homes or offices," the opinion is founded principally on the determination that the Fourth Amendment addresses only searches of "material things" 277 U.S. at 464; 48 S.Ct. at 568. *Katz* changed this formulation by holding that the Fourth Amendment is not based on "constitutionally protected areas" or "right to privacy" (trespass law), 389 U.S. at 350; 88 S.Ct. at 510, but on the invasion of the "privacy upon which he justifiably relied," stating:

> But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. 384 U.S. at 351; 88 S.Ct. at p. 511.

Katz did *not* hold that trespass or physical intrusion would no longer be indicative of a search, but rather that an invasion of a reasonable expectation of privacy could constitute a search even in the absence of a trespass or intrusion.

Although the *Oliver* opinion states that the common law of trespass has "no relevance" to the application of the Fourth Amendment (466 U.S. at p. 184, 104 S.Ct. at p. 1744), this Court in *Soldal v. Cook County*, 506 U.S. 56; 113 S.Ct. 538; 121 L.Ed.2d 450 (1992) noted that "property rights . . . were afforded Fourth Amendment protection." 506 U.S. at 63-64; 113 S.Ct. at 544. Although *Soldal* notes that under *Oliver* the Fourth Amendment "does not protect possessory interests in all kinds of property" 506 U.S. at 62; 113 S.Ct. at 549, fn. 7, *Soldal* clearly indicates that trespass does have constitutional significance. *See also, Horton v. California*, 496 U.S. 128, 136-137; 110 S.Ct. 2301, 2307-2308; 110 L.Ed.2d 112 (1990). The occupant of commercial property has a reasonable expectation, recognized by society and the Court, to exclude government inspectors from trespassing on the premises without a search warrant, *Marshall v. Barlow's, Inc., supra*, even when the property is out-of-doors. *Donovan v. Dewey*, 462 U.S. 514; 101 S.Ct. 2534; 69 L.Ed.2d 269 (1981).

II. REGULATORY INSPECTIONS WITHOUT CONSENT ARE SUBJECT TO THE WARRANT REQUIREMENT

Administrative entry without consent on a commercial premises can only be properly effected through the warrant procedure. *See v. City of Seattle*, 387 U.S. 541; 87

S.Ct. 1737; 19 L.Ed.2d 943 (1967). "The business man . . . has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Idem*, 387 U.S. p. 543, 98 S.Ct. p. 1739. A proprietor of a commercial premises has the right to conduct business free from unreasonable official intrusion. *GM Leasing Corp. v. United States*, 429 U.S. 338, 353; 98 S.Ct. 619, 629; 50 L.Ed.2d 530 (1977).

Warrantless searches of commercial premises are generally unreasonable. *Marshall v. Barlow's, Inc.*, 436 U.S. at 312; 98 S.Ct. at 1820 (administrative searches by OSHA for safety hazards in the work area). The Fourth Amendment has its roots in the offensiveness of the general warrant, which was " . . . acutely felt by the merchants and businessmen whose premises and products were inspected" *Idem, United States v. Chadwick*, 433 U.S. 1, 7-8; 97 S.Ct. 2476, 2481; 53 L.Ed.2d 538 (1977). An owner of a business has an expectation of privacy in commercial property which society is prepared to consider to be reasonable, even in the context of administrative inspections designed to enforce regulatory statutes. *New York v. Burger*, 482 U.S. 691, 699; 107 S.Ct. 2636, 2642, 96 L.Ed.2d 601 (1987).

The Fourth Amendment is applicable to regulatory inspections of commercial premises, even if those premises are out of doors. *Donovan v. Dewey*, 452 U.S. 594; 101 S.Ct. 2534; 69 L.Ed.2d 269 (1981) (surface stone quarry).

Warrantless inspections of commercial premises may be constitutionally objectionable if their occurrence is so random or unpredictable that the owner has no real expectation that the premises will be inspected. *Idem*, 452

U.S. at 599, 101 S.Ct. at 2538. Where no legislative rules have been established governing the procedures the inspectors must follow, a warrant may be necessary to protect the owner from the unbridled discretion of the officers. *Marshall v. Barlow's Inc.*, 436 U.S. at 323, 98 S.Ct. at 1826. Without a warrant, the occupant has no way of knowing the lawful limits of the inspector's power to search. *Camara v. Municipal Court, supra*, 387 U.S. 523, 532; 87 S.Ct. 1727, 1732; 18 L.Ed.2d 930 (1967).

The search contemplated by the five-member MDNR team to conduct a "wetland determination" and "mapping" is subject to the same warrant requirement. If government inspectors may constitutionally remain on out-of-doors property even after being told they are trespassing, there is no restriction on the length, extent or intrusiveness of the inspection in the absence of a search warrant.

The Sixth Circuit's holding that a visual inspection during a warrantless entry onto open fields does not constitute a unreasonable search for Fourth Amendment purposes conflicts with this Court's holdings that a regulatory inspection by visual observation is subject to the Fourth Amendment warrant requirement. *Camara v. Municipal Courts, supra* (inspection for housing code violations) *See v. City of Seattle, supra* (fire code inspection), and *Marshall v. Barlow's, Inc., supra* (inspection by OSHA for safety hazards).

III. THE EXERTION OF DOMINION AND CONTROL OVER A PREMISES FOR INSPECTION IS A SEIZURE.

The decision by governmental authorities to exert dominion and control over the property for their own purposes constitutes a "seizure." *United States v. Van-Leeuwen*, 397 U.S. 249; 90 S.Ct. 1029; 25 L.Ed.2d 282 (1970), *United States v. Jacobsen*, 466 U.S. 109, 120; 104 S.Ct. 1652, 1669; 80 L.Ed.2d 85 (1984). A meaningful interference with an individual's possessory interest in property is a seizure. *Idem*, 466 U.S. at 113, 104 S.Ct. at 1656. A warrantless *de minimis* infringement of a possessory interest can be constitutionally reasonable. *United States v. Jacobsen, supra*, 466 U.S. at 125-126; 104 S.Ct. at 1162-1163. *Cardwell v. Lewis*, 417 U.S. 583, 591-592; 94 S.Ct. 2464, 2469-2470; 41 L.Ed.2d 325 (1974). The extent of the warrantless intrusion will determine whether it is "reasonable" for Fourth Amendment purposes. *United States v. Place*, 462 U.S. 696; 103 S.Ct. 2637; 77 L.Ed.2d 110 (1983). A request by the government to allow five officials "knowledgeable in plants and soils" to enter onto enclosed land to perform a wetland determination is an exercise of dominion and control over that property. Their proposed entry for this purpose is a seizure subject to the Fourth Amendment.

IV. THE SEIZURE ACTIVITY ANTICIPATED BY THE MDNR IS NOT ALLOWED UNDER THE OPEN FIELDS DOCTRINE

While permitting warrantless entry and "observation" in "open fields," the decisions of *Oliver v. United States, supra,* and *United States v. Dunn,* 480 U.S. 294; 107 S.Ct. 1134; 94 L.Ed.2d 325 (1987), do not permit the seizure activity contemplated by the MDNR. *Oliver* and *Dunn* were limited to "police observations . . . while standing in the open fields." (408 U.S. p. 303-305, 107 S.Ct. p. 1142). Neither *Oliver* nor *Dunn* allow the greater intrusion of a warrantless seizure.

The conducting of tests on a premises without either a warrant or the occupant's consent is an unreasonable search within the meaning of the Fourth Amendment. *Camara v. Municipal Court, supra.* The Fifth Circuit has recognized "a reasonable expectation of privacy in *the land under* an open field." *Husband v. Bryan,* 946 F.2d 27, 29 (CA 5, 1991) (emphasis added).

Dow Chemical v. United States, supra, upheld the ruling of *See v. City of Seattle, supra* while approving mere visual observation through aerial photography without a warrant. An intrusive entry involving tests of soil and water and the seizure of soil and plant samples requires the prior authorization of a search warrant.

Moving a stereo in plain view to locate the serial number constituted a "search." *Arizona v. Hicks,* 480 U.S. 321; 107 S.Ct. 1149; 94 L.Ed.2d 347 (1987). *Arizona v. Hicks* rejected the invitation "to seek a new creature" that is neither a "cursory inspection" nor a "full-blown search." *Idem,* 480 U.S. at 328; 107 S.Ct. at 1154. The taking of soil

boring samples, the analysis of soil colors and textures and saturation, and the measuring of water levels in soil pits, which are necessary components of a wetland determination are far beyond a "cursory inspection," and therefore are sufficiently intrusive to constitute a "search", implicating the full protections of the Fourth Amendment.

The open fields doctrine is limited in scope to sights seen in the open field. *Air Pollution Variance Board of Colorado v. Western Alfalfa Corporation,* 416 U.S. 861, 865; 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974) (neither the inspector nor the public had been excluded from the area where the observations took place). The warrantless physical intrusion, manipulation and dismantling of beehives located in open fields is not sanctioned by the visual inspection allowable under the open fields doctrine. *Allinder v. State of Ohio,* 808 F.2d 1180, 1186 (CA 6, 1987).

It was within the trial judge's discretion to infer from the evidence that the DNR intended to probe the soil if allowed entry on August 22, 1989. The trial judge is vested with the authority to "take into account the knowledge he gained from presiding at the trial, knowledge that the appellate court will not have." 2 Charles A. Wright, *Federal Practice and Procedure,* Sec. 559, at 369 (footnote omitted).

As noted in Judge Nelson's dissenting opinion below, there was a sufficient basis for the district judge to infer the DNR's intent to conduct an extensive wetland "determination," including probing the soil. Upon this allowable inference, the trial court's ruling that Defendant Rapanos had a Fourth Amendment right to refuse entry

to the DNR was not an application of an erroneous legal standard.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellant,	)	
v.	)	No. 95-2169
JOHN A. RAPANOS,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 93-20023 – Lawrence P. Zatkoff, District Judge.

Argued: March 21, 1997

Decided and Filed: May 28, 1997

Before: LIVELY, NELSON, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Jennifer J. Peregord, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellant. John L. Wildeboer, SKINNER & WILDEBOER, Bay City, Michigan, for Appellee. **ON BRIEF:** Jennifer J. Peregord, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellant. John L. Wildeboer, SKINNER & WILDEBOER, Bay City, Michigan, for Appellee.

LIVELY, J., delivered the opinion of the court, in which MOORE, J., joined. NELSON, J. (pp. 17-25), delivered a separate dissenting opinion.

OPINION

LIVELY, Circuit Judge. This appeal requires us to consider the "open fields" doctrine in an unusual setting. After two trials, the first ending in a mistrial, a jury found the defendant, John A. Rapanos, guilty of two counts of discharging pollutants into wetlands in violation of 33 U.S.C. § 1311(a) (1988). In response to the defendant's post-trial motion for acquittal or for a new trial, the district court granted a new trial upon concluding that it had made a reversible evidentiary ruling. Defense counsel had not objected to admission of the testimony that the court determined had been erroneously received, but the court found that it had committed plain error. The government appeals, and we now reverse.

I.

The defendant, John A. Rapanos, owns a large amount of real estate in Michigan, including the 175 acre parcel of land in Williams Township that is the subject of the present controversy (Salzburg Road Property). In 1988, Mr. Rapanos negotiated an option agreement with a developer that contemplated the construction of a shopping mall on the Salzburg Road Property. To make the property more attractive to the optionee, the defendant then spent over $300,000 in late-1988 and 1989 in order to clear the heavily-wooded property of trees and shrubs and to eradicate wetlands by filling them with sand.

On December 2, 1988, the defendant's attorney provided the Michigan Department of Natural Resources (DNR) with an outline of the defendant's plan for development and a survey of the property. The DNR responded by notifying Mr. Rapanos that the property appeared to contain wetlands and that, if this were true, a permit would be required before development could begin. As a follow-up to this correspondence, two DNR officials toured the property with the defendant and his attorney on March 1, 1989. The DNR inspectors determined that the property did in fact contain some wetlands and observed that "[t]he vegetation on much of the site had been scalped, removed by using either a bulldozer, or some other type of heavy equipment. . . . " At the conclusion of the meeting, the DNR officials reiterated that a state permit would be required before any development could take place and informed Mr. Rapanos that he would have to obtain a "wetlands delineation" (a map showing the boundaries of wetlands areas on a parcel of land) before receiving that permit.

The defendant quickly hired a wetlands consultant, Dr. Glenn Goff, to prepare the wetlands delineation, telling him, according to Dr. Goff, to "get [the DNR] off my back." Over a period of several weeks Dr. Goff gathered information pertaining to the property, including soil and plant samples, on which he would base his delineation. When Dr. Goff reported his preliminary finding that the property contained nearly 50 acres of wetlands, however, Mr. Rapanos discharged him and allegedly ordered Dr. Goff to destroy his study materials and preliminary report. Dr. Goff testified that the defendant was enraged

and exclaimed that "he'd destroy all those (expletive deleted) wetlands."

After firing Dr. Goff, the defendant continued to prepare the property for development. Charles Dodgers, an employee in the DNR's Land and Water Management Division, periodically visited the property during the spring and summer of 1989 and witnessed this preparation, which the government characterizes as "systematic wetlands destruction." On July 24, 1989, the DNR directed Mr. Rapanos to "cease further filling activities immediately, and to contact [the DNR] regarding your intent for this wetland parcel." When the defendant ignored this cease and desist order, the DNR eventually held two meetings with Mr. Rapanos to discuss the status of the property.

The first meeting occurred on August 22, 1989, when five DNR officials met the defendant at the boundary of his property. Although their trial testimony does not indicate precisely what they intended to accomplish at this "relatively short meeting," these officials apparently hoped to make a cursory inspection of the property to determine the extent to which it could be classified as wetlands and the extent to which unauthorized filling activity had already occurred. Steven Spencer, a DNR district supervisor present at the meeting, testified that, had they been granted access to the property, the DNR officials likely would have made a "wetlands determination" (a routine, generally visual inspection to determine whether a tract of land contains any wetlands). At any rate, all of the parties agree that the DNR did not plan to conduct a full-blown "wetlands delineation," which would have involved the taking of numerous soil and

plant samples, among other things. Mr. Rapanos, in fact, testified that none of the DNR officials present had the "ability or capacity" to perform a delineation. Moreover, all of the parties agree that, whatever its purpose, the meeting ended when the defendant refused to allow the DNR officials onto the property without a search warrant.

The second meeting occurred on August 30, 1989, at the corporate headquarters of the defendant's Rapanos Investments Group. This meeting proceeded in much the same manner as the first, with Mr. Rapanos denying the officials access to the Salzburg Road Property. The DNR investigators ultimately obtained a search warrant, which they executed on November 7, 1989. At this point, they took numerous plant and soil samples and were able to document the presence of at least 28 acres of wetlands notwithstanding their significant degradation.

II.

A.

On April 13, 1994, a federal grand jury charged the defendant with knowingly discharging pollutants into wetlands in violation of 33 U.S.C. § 1311(a), stemming from the clearing and filling activities at the Salzburg Road Property. Although the defendant's first trial on these charges ended in a mistrial, some aspects of it – particularly the trial court's ruling regarding whether the defendant had a Fourth Amendment right to preclude a warrantless inspection of his property – are relevant to this appeal.

In its opening statement at the first trial, the government alluded to the defendant's refusal to allow a warrantless inspection of his property by DNR officials on August 22 and August 30, 1989. The government's first witness testified in greater detail about the defendant's refusal, which prompted the defense to object on the basis that this testimony constituted an improper comment on the defendant's assertion of his Fourth Amendment right to be free from unreasonable searches and seizures. The parties then submitted memoranda of law on the issue to the trial court, which, after reviewing these memoranda during a five minute break in the trial, ruled that the testimony was admissible. The defense later objected to Charles Dodgers's testimony about observations that he made during five warrantless entries onto the property during the spring and summer of 1989. The government responded that the objection was not timely because it should have been made in a motion *in limine*. The government also filed a brief with the court discussing the open fields doctrine and its relevance to Mr. Dodgers's inspections of the property. The court ultimately admitted the testimony on the basis that the defendant's suppression motion was not timely made. It is not clear whether the court considered the open fields argument. The case proceeded for several weeks after these rulings until a mistrial was declared due to juror scheduling problems.

After the mistrial, a grand jury re-charged the defendant with unlawfully filling wetlands in violation of 33 U.S.C. § 1311(a) in two counts of a four-count superseding indictment. Although the defendant obviously knew

that the government would again seek to introduce testimony about the defendant's assertion of his alleged Fourth Amendment rights, he filed no motion *in limine* addressing the issue. The second trial began on February 1, 1995, and during this trial both parties examined witnesses during the government's case-in-chief about the defendant's refusal to allow the DNR officials onto his property without a search warrant. The defense did not object to the government's introduction of this evidence but rather cross-examined the government's witnesses. The August meetings were also discussed during the defendant's case-in-chief, especially when the defendant was cross-examined without objection about his conduct at these meetings. The following colloquy occurred during this cross-examination:

> Q. And this August 30th meeting, again, you had not let the DNR on the property?
>
> * * *
>
> A. He [Jake Allan, the defendant's attorney] told him just point blank, you will not be allowed on the property.
>
> Q. And you agreed with that?
>
> A. He said you cannot go on the property without a search warrant, I think.
>
> Q. And you said the same thing?
>
> A. [not responsive]
>
> Q. I would like you to answer the question, though. You also told the DNR that they could not go back on the property without a search warrant?
>
> A. I didn't say those words.

Q. Words to that effect?

A. No.

Q. Since you were certain in your own mind that there were no wetlands there, why not let the DNR on the property?

A. It's not my decision.

Q. Were you practicing concealment again?

A. They could get a search warrant, Miss Parker, and they could go out there the next day if they wanted to. We couldn't stop them, okay. There's no concealment. They know the procedure. First of all, they were trespassing on our property. Jake was very upset about that. He said, look, you don't go on any of our properties ever again. Don't you dare go on there without our permission or a search warrant. That's what was said [at] that meeting.

Q. So were you practicing concealment, or not?

A. No.

* * *

Q. So you weren't willing to say, don't worry, I have nothing to hide, let them on?

A. I don't think that came up.

Q. All right. And as a client, you have the ability to do that; right? To say to your attorney, look, go ahead, let them on.

A. I learned a long time ago, that if you don't take your attorney's advice you shouldn't have him. . . .

Q. So the bottom line is, though, you knew that you could talk to him about that and try to convince him to do that and you chose not to?

A. It didn't happen.

As noted earlier, the defense did not object to this line of questioning. The trial then continued for two-and-a-half weeks longer, during which the parties presented detailed evidence about the nature of wetlands and the activities on the Salzburg Road Property. After hearing all of this evidence, the jury found the defendant guilty on both counts of wetlands degradation.

B.

Immediately after the jury returned its guilty verdict, the defendant moved for an extension of time to file a motion for judgment of acquittal pursuant to FED. R. CRIM. P. 29. The trial court granted the extension, and within the extended time the defendant filed a "Motion for Judgment of Acquittal and a New Trial" and a 46-page supporting brief. This motion offered 10 grounds for relief, including prosecutorial misconduct. On the basis of this brief and the government's response brief, the trial court denied the motion for acquittal but granted the motion for a new trial.

The opinion and order granting the new trial did not discuss the arguments raised by the parties other than to reject the defendant's allegations of prosecutorial misconduct. Instead, the district court based its decision on the government's cross-examination of Mr. Rapanos, specifically, the questions about whether the defendant was

"practicing concealment" when he refused to consent to warrantless searches of his property by the DNR officials. Although the defense raised no objection to this testimony during the second trial, the court concluded that its introduction impermissibly infringed upon the defendant's Fourth Amendment rights and constituted "plain error" under FED. R. CRIM. P. 52(b):

> At the time of the cross examination, the Court was deeply concerned about the prejudicial effect of such questioning, finding it akin to comments regarding a defendant's silence following *Miranda* warnings. The Court was prepared to offer a curative instruction, however, the questioning proceeded without objection from the defense.
>
> During the course of the trial the objections from each side had been so numerous, that, when defense counsel failed to object, the Court was loath to interfere. It was the perception of the Court at the time that the decision not to object must have been strategic, and it is generally the Court's policy to allow attorneys latitude in the manner of presentation of their cases. Upon consideration and review, the Court finds that it was plain error to allow the discourse to continue.

As this excerpt from its opinion suggests, the district court drew an analogy to Supreme Court cases holding that a prosecutor or trial judge cannot comment on a defendant's exercise of his Fifth Amendment right against self-incrimination. See, *e.g.*, *Doyle v. Ohio*, 426 U.S. 610 (1976) (a defendant's silence following *Miranda* warnings cannot be used to impeach an exculpatory story told for the first time at trial); *Griffin v. California*, 380 U.S. 609

(1965) (a prosecutor's comment regarding the defendant's failure to testify at trial violates the self-incrimination clause of the Fifth Amendment). The district court noted that in recent years some courts have extended this rule to prohibit prosecutorial comment on a defendant's exercise of his Fourth Amendment rights. For instance, the district court discussed at some length the decision in *United States v. Thame*, 846 F.2d 200 (3rd Cir.), *cert. denied*, 488 U.S. 928 (1988), which held that it was error, although not plain error on the facts of that case, for a prosecutor to comment on a defendant's refusal to consent to a warrantless search of a piece of luggage. Distinguishing *Thame*, the court concluded that on the facts of the instant case, the questions about "practicing concealment" did amount to plain error:

> In *Thame*, the Court found that there was overwhelming evidence of the defendant's guilt from which the jury could reach a decision, and therefore the comments were *not* "sufficiently major that a miscarriage of justice will result if the conviction is not reversed." (Internal citation omitted). This Court cannot reach the same conclusion in the instant action.
>
> It is the opinion of the Court, after viewing the entirety of the trial, that a reasonable jury could have rendered either verdict. . . . In such a situation, an unchecked prejudicial comment may indeed have tipped the scales in favor of conviction.

Accordingly, the court granted the defendant a new trial. The district court denied the government's motion for reconsideration and the government filed a timely notice of appeal. This court has jurisdiction to review the

decision of the district court pursuant to 18 U.S.C. § 3731 (1988).

III.

The government asserts that the district court did not have jurisdiction to grant a new trial because the defendant failed to file a motion for a new trial within seven days after the guilty verdict. See FED. R. CRIM. P. 33; *United States v. Koehler*, 24 F.3d 867, 869 (6th Cir. 1994), *cert. denied*, 513 U.S. 1077 (1995) (a court lacks jurisdiction to consider on the merits an untimely motion for new trial). Immediately following the jury verdict, Mr. Rapanos moved for an extension of time to file a "Motion for Delayed Verdict of Acquittal," and the district court granted him twenty-one days to file his motion. Between the seventh and twenty-first days of this period, he filed a "Motion for Judgment of Acquittal and a New Trial." We believe it was reasonable for the district court to treat the request for an extension as applying to a motion for a new trial as well as to a motion for acquittal. Thus, the motion actually filed within the period of the extension was timely and the district court had jurisdiction to consider its merits.

IV.

A.

This court reviews a district court's order granting or denying a motion for a new trial under an abuse of discretion standard. *United States v. Breinig*, 70 F.3d 850, 852 (6th Cir. 1995). As the *Breinig* court explained, "[t]he

narrow standard of review corresponds to the rationale underlying FED. R. CRIM. P. 33 that 'the trial judge, not an appellate court reading a cold record, can best weigh the errors against the record as a whole to determine whether those errors in the conduct of the trial justify a new trial'." *Id.* (quoting *United States v. McBride*, 862 F.2d 1316, 1320 (8th Cir. 1988)).

B.

Unless the defendant had a Fourth Amendment right to prevent the DNR representatives from coming onto the Salzburg Road Property for an inspection, the entire premise for the district court's "plain error" ruling is flawed. In the absence of a constitutional right that could be exercised, comments on the defendant's efforts to bar the entry were not prejudicial in the sense found by the district court. To determine whether Mr. Rapanos possessed a Fourth Amendment right to bar the DNR representatives' entrance, we must consider the open fields doctrine.

The open fields doctrine, as enunciated by the Supreme Court in *Hester v. United States*, 265 U.S. 57 (1924), and reaffirmed in *Oliver v. United States*, 466 U.S. 170 (1984), holds that the government's intrusion onto open fields without a search warrant "is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." *Oliver*, 466 U.S. at 177. The doctrine stems from the Supreme Court's observation that the Fourth Amendment refers only to "persons, houses, papers, and effects" (and not to fields) and the Court's

belief that society is not prepared to recognize as reasonable an individual's subjective expectation of privacy in an open field. *Id.* at 176-80. The Supreme Court, moreover, has made clear that the application of this doctrine does not turn on the nuances of particular cases and that trial courts should not adopt an ad hoc approach to evaluating whether an individual has a reasonable expectation of privacy in a particular open field. The rather typical presence of fences, closed or locked gates, and "No Trespassing" signs on an otherwise open field therefore has no constitutional import. *Id.* at 181-82.

V.

A.

We have no difficulty finding that the Salzburg Road Property should be considered open fields. The property consists of 175 acres, contains no buildings, and is bordered by an interstate highway and a major state highway. Although largely forested prior to 1988, the land has since been almost entirely denuded of trees and other vegetation due to Mr. Rapanos's clearing and sand-filling projects. Mr. Rapanos argues that the land cannot properly be characterized as open fields because: (a) it is surrounded by a fence and a tall "hedgerow" of cleared debris; (b) entry onto the land can be made only through a locked gate; and (c) by the time of the DNR's attempted searches in August 1989, "the land had undergone extensive alteration and development for one economic purpose or another and was clearly 'commercial property'."

None of these factors, however, has any bearing on whether the property is open fields. The Supreme Court

has defined open fields so broadly that, for constitutional purposes, even property that is neither open nor a field (such as a thickly wooded area) can be treated as an open field. *Oliver*, 466 U.S. at 180 n.11. As noted earlier, moreover, the presence of a fence or gate or a "No Trespassing" sign does not engender a reasonable expectation of privacy for Fourth Amendment purposes. *Id.* at 182; see also *United States v. Burton*, 894 F.2d 188, 190 (6th Cir.), *cert. denied*, 498 U.S. 857 (1990). Finally, although there is some intuitive appeal to the defendant's argument that the open fields doctrine cannot apply to land that has been developed or prepared for development, the Supreme Court's decision in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), undermines that contention entirely. The *Dow* court held that even a 2,000 acre industrial complex is "more comparable to an open field" than to curtilage in which a landowner has a reasonable expectation of privacy. *Id.* at 239. Given the Supreme Court's holdings in this area, there is no doubt that the Salzburg Road Property is open fields.

The defendant attempts to distinguish his situation from the run-of-the-mill open fields case involving a warrantless search of a secluded marijuana patch by reason of the fact that he was present on August 22 and August 30 when the government agents attempted to gain access to his property. The defendant suggested at oral argument that when a landowner is present there is a great risk of violence if an angry property owner uses force or threats of force to deny access to his property. Perhaps as a matter of public policy the defendant's suggestion makes good sense. Adopting such a rule, however, would put this court directly in conflict with the Supreme

Court's definition and application of the open fields doctrine.

The tacit assumption behind the defendant's position appears to be that a landowner's presence at the time of a search or attempted search creates a reasonable expectation of privacy. In essence, the defendant argues for a case-by-case determination as to whether the landowner sufficiently established a reasonable expectation of privacy in his land. But, as this court noted in *Burton,* the Supreme Court has expressly rejected this practice to avoid the "danger that constitutional rights will be arbitrarily and inequitably enforced." *Oliver,* 466 U.S. at 181-82. Although a landowner who is present and attempting to bar entry may have a *subjective* expectation of privacy, the Supreme Court has rejected "the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate." *Id.* at 182. For constitutional purposes, therefore, a landowner's presence does not differ in consequence from the erection of a fence or "No Trespassing" sign: none of these actions creates a reasonable expectation of privacy in open fields.

B.

The defendant's further argument on appeal is that the open fields doctrine is not applicable on the facts of this case because the doctrine permits only visual inspections (as opposed to seizures) of property. See *Allinder v. Ohio,* 808 F.2d 1180, 1185 (6th Cir. 1987) ("[T]he Supreme Court has consistently adhered to the open fields doctrine while at the same time recognizing that it is limited in

scope to 'sights seen in "the open fields" '."); *Husband v. Bryan*, 946 F.2d 27, 29 (5th Cir. 1991) ("Neither this court nor the Supreme Court have extended the open fields doctrine to anything beyond observation searches."). Thus, in typical open fields cases where police officers have spied evidence of the manufacture or possession of illegal drugs, those officers usually have obtained a warrant before actually seizing the evidence. See, *e.g.*, *Oliver*, 466 U.S. at 174; *United States v. Dunn*, 480 U.S. 294, 298 (1987).

The defendant argues that the DNR contemplated undertaking "full scale seizure activity." The record does not support his argument. Everyone who attended the August 22 and August 30 meetings, Mr. Rapanos included, agreed that the DNR inspectors did not intend to conduct a full-scale wetlands delineation. The testimony of the DNR inspectors indicates that they intended to point out to Mr. Rapanos what portions of his property qualified as wetlands and that they hoped to determine the extent to which the defendant had destroyed these wetlands by filling them with sand. Significantly, the record contains no direct evidence that the DNR officials intended to do anything but make visual inspections of the property and discuss with the defendant his need to obtain an environmental permit. Further, defense counsel made no attempt to elicit from the witnesses any testimony that would support the defendant's present argument that the DNR inspectors intended to seize soil and plant samples during the August meetings and attempted entries. The defendant suggests that this court should look at the DNR's activity on November 7, 1989, when the inspectors performed something approaching a full-scale

wetlands delineation involving at least 35 soil samples and numerous plant samples. The problem with this argument is that the activity on that date occurred after the execution of a federal search warrant. Thus, there is no basis for comparing this activity to whatever the DNR might have hoped to accomplish at the August meetings.

C.

Since the Supreme Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), the touchstone of Fourth Amendment analysis "has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy'." *Oliver*, 466 U.S. at 177 (*quoting Katz*, 389 U.S. at 360 (Harlan, J., concurring)). If a person cannot establish a reasonable expectation of privacy, then the government's search of his property simply does not implicate the Fourth Amendment. Mr. Rapanos has not shown that the DNR officials intended to do anything but make a visual inspection of his property on August 22 and August 30, 1989. Under *Oliver*, a visual inspection made during a warrantless entry onto open fields does not constitute an unreasonable search for Fourth Amendment purposes.

CONCLUSION

In the absence of a Fourth Amendment right to bar entry by the DNR personnel, Mr. Rapanos's efforts amounted to no more than a protest against a common law trespass. This being so, the prosecutor's questions

and characterization did not constitute a prejudicial comment on a defendant's assertion of a constitutional privilege.

This is one of those rare cases in which we are convinced that the district court abused its discretion by granting a new trial. A ruling based on a failure to apply settled law is an abuse of discretion. See *Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487, 492 (6th Cir. 1993) (a district court abuses its discretion "when it improperly applies the law or uses an erroneous legal standard."). Since *Oliver*, it is no longer open to question that the Salzburg Road Property is open fields. Thus, the district court did not commit plain error by failing to exclude the questioning upon which it based its new trial order. If defense counsel had objected, the court properly could have stopped the prosecutor from badgering and arguing with the witness. But there was no constitutional basis for excluding the questions and comments.

The judgment of the district court is **REVERSED**, and the jury's verdict is reinstated. The case is **REMANDED** to the district court for sentencing.

DISSENT

DAVID A. NELSON, Circuit Judge, dissenting. Rule 33, Fed. R. Crim. P., authorizes the granting of a new trial "if required in the interest of justice." Judge Zatkoff, the district judge who conducted both of defendant Rapanos' trials, concluded that "a miscarriage of justice will result" if Mr. Rapanos is fined or sent to prison on the strength of

a verdict returned by a jury that saw the defendant raked over the coals in cross-examination for electing to exercise rights which the judge believed were secured by the United States Constitution. *United States v. Rapanos*, 895 F. Supp. 165, 169 (E.D. Mich. 1995) (quoting *United States v. Thame*, 846 F.2d 200, 207 (3d Cir.), *cert. denied*, 488 U.S. 928 (1988)).[1]

Judge Zatkoff knew far more about this complex criminal case than I do. Given the respect to which his view of the case is entitled, I find myself unable to conclude that Judge Zatkoff abused his discretion in determining that the interest of justice required a new trial. I agree with the conclusion reached by my colleagues on the panel as to the timeliness of the defendant's post-trial motion, but I respectfully dissent from the panel's decision to reinstate a verdict which the trial court found to be tainted.

I

If error has crept into the trial of a criminal case, as the majority opinion notes (quoting *United States v. Breinig*, 70 F.3d 850, 852 (6th Cir. 1995), which in turn quotes *United States v. McBride*, 862 F.2d 1316, 1320 (8th Cir. 1988)), the judge who presided at the trial is the person best situated to "weigh the errors against the

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[1] The "interest of justice" standard is such a broad one that the granting of a new trial is not necessarily dependent upon the trial court's concluding that it committed legal error. In the interest of justice, a trial court may grant a new trial based on reconsideration of its disposition of any discretionary matter. See *United States v. Vicaria*, 12 F.3d 195, 198 (11th Cir. 1994).

record as a whole" in order to determine whether a new trial is justified. A judge who has seen and heard the entire proceeding, listening to all the evidence and arguments of counsel and perhaps sensing the reactions of the jurors, will obviously have a better feel for the case than "an appellate court reading a cold record. . . ." *Breinig, id.* The trial judge, accordingly, will be in a much better position to determine the need for a new trial than any appellate panel can hope to be. See *United States v. Draper,* 746 F.2d 662, 665-66 (10th Cir. 1984).

Where, as is true here, large portions of the trial proceedings have been omitted from the transcript furnished the appellate panel, the panel cannot even attempt "[to weigh] the record as a whole." Accordingly, unless Judge Zatkoff was clearly wrong in concluding that he should have stopped the prosecution from cross-examining defendant Rapanos about what the defendant was trying to hide when he refused to let a team of government investigators enter his property, it seems to me that we have no sensible alternative but to let the retrial order stand.

My understanding of the factual background differs in a few respects from that reflected in the majority opinion. Before addressing the legal question, therefore, it may be helpful for me to sketch out some of my factual assumptions.

II

Two senior government ecologists inspected Mr. Rapanos' Salzburg Road land with Rapanos and his lawyer on March 1, 1989, in order to determine if there were

regulated wetlands on the site. On the basis of this on-site inspection, as one of the ecologists subsequently testified, the officials made a determination that the property contained "rather extensive wetlands."

The officials did not collect soil samples and vegetation specimens on March 1 – as they would have done had they intended to delineate the boundaries of the wetlands – but one of them, Regional Supervisor Richard Sikkenga, wrote the words "wetland DET[ERMINATION]" in his daily journal.[2] The officials told Mr. Rapanos and his lawyer that a delineation of the wetlands would be necessary before a permit could be issued for commercial development of the property. It might take the Department of Natural Resources months to find time for performing a delineation, the officials said, and they recommended that Mr. Rapanos have the delineation done by an outside consultant instead.

Mr. Rapanos subsequently engaged Dr. Frederick Glenn Goff for this purpose, selecting him from a consultants' list prepared by the state. On March 16, 1989, Dr.

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[2] The other official, Hal Harrington, testified that a "determination" involves the question whether wetlands are present on a site at all, while a formal "delineation" is an exercise that results in quite a precise demarcation of the boundaries of the wetlands. The usage in the trial record is far from consistent, even on Mr. Harrington's part, and a Corps of Engineers "Wetlands Delineation Manual" that was received in evidence seems to use the terms interchangeably. The manual indicates that where on-site inspections are necessary, even "routine determinations" – to say nothing of "comprehensive determinations" – may entail digging soil pits at representative locations and taking samples of soil from beneath the surface.

Goff met on the site with Regional Director Sikkenga and Charles Dodgers, a member of Mr. Sikkenga's staff. Among the subjects discussed were the methodology to be used in performing a delineation and the locations at which cores of soil would be extracted. Mr. Rapanos did not attend this particular on-site session, but his lawyer, Jake Allen, did attend. Mr. Allen was undoubtedly privy to the discussion about extracting core samples from various parts of the property.

The preliminary results of Dr. Goff's delineation studies did not satisfy Mr. Rapanos, and Dr. Goff was discharged. Mr. Rapanos seems to have felt, rightly or wrongly, that like two consultants who followed him, Dr. Goff was trying to curry favor with the Department of Natural Resources, thereby protecting his consulting business, by treating as "wetlands" areas that were not in fact wetlands under what Rapanos conceived to be a commonsense view of things.

Mr. Rapanos thought of wetlands in terms of swamps, or marshes, or bogs. He ultimately took the position that for the most part, at least, his Salzburg Road property – which had been heavily wooded until he set up a sawmill and cut the timber – was simply not subject to regulation under a statute dealing with the discharge of pollutants into the nation's navigable waters.

Notwithstanding the absence of a comprehensive wetland delineation, and proceeding without a permit, Mr. Rapanos removed (or ground up) tree stumps, shrubs, and other vegetation from the Salzburg Road property; tilled and graded the soil; and brought in a considerable quantity of sand. Mr. Dodgers, of the

Department of Natural Resources, entered the site repeatedly during May, July, and August of 1989 and observed the progress of the work on areas that he considered to be wetlands. Mr. Dodgers took a series of photographs, some of which were introduced in evidence at trial.

Mr. Dodgers drafted a cease and desist order that was issued by District Supervisor Steven Spencer on July 24. Dodgers then conducted three on-site inspections – taking photographs each time – after the cease and desist order had been issued. These inspections took place on August 9, 10, and 14. Finally, on August 22, 1989, a team of five DNR officials – Harrington, Sikkenga, Spencer, Dodgers, and Program Coordinator Peg Bostwick – met with Mr. Rapanos at the entrance to his property.

During the second trial of the case, the prosecutor repeatedly tried to get Mr. Rapanos to admit that he was told on August 22 that the team had been assembled "to do a wetland delineation."[3] Mr. Rapanos denied having been told this, and his testimony seems consistent with that of at least some of the state witnesses. Whether or

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[3] The understanding that a "delineation" was intended is also reflected in a trial brief filed by the government on July 5, 1994, during the course of the first trial. In response to an objection to the cross-examination of Mr. Rapanos about his refusal to let the team on the property prior to the issuance of a search warrant, the brief argued that the government was entitled to show that "the main reason that the DNR could not make an earlier (and hence more accurate and complete) *delineation* of the wetlands on defendant's property was that *defendant prevented DNR from entering the property . . . at an earlier time*, thereby giving defendant more time in which to alter the condition of the land." (Emphasis supplied.) The government did not cite the "open fields" doctrine at all in this connection.

not a delineation had been planned for August 22, however, it appears to be beyond dispute that members of the team gave Mr. Rapanos to understand that *at some point* they intended to perform a delineation. Mr. Rapanos took vigorous exception to their doing so.

According to testimony given at the second trial by Program Coordinator Peg Bostwick, Mr. Rapanos was

> "unwilling to accept any delineation or mapping of wetland boundaries on the property by our staff. He indicated he felt that there were differences between state methods and federal methods that made it too confusing. There was discussion about that with our staff. Our staff attempted to clarify for him that there was not a great deal of difference, but all he needed to do was to follow the state law. He indicated that was not satisfactory.
>
> * * *
>
> He indicated that until he researched the subject and came up with a method of mapping wetland boundaries that was acceptable to him, he would not accept any definition of boundaries that we would make on that property."

Mr. Rapanos and his lawyer undoubtedly understood that the work which the DNR expected to perform on the Salzburg Road property would entail the collection of a significant quantity of physical evidence. Subsequent events support that understanding. On November 7, 1989, an expanded team from the DNR went on the property with a search warrant. Although the team still did not perform a comprehensive delineation – the government has acknowledged that no such delineation was

ever performed on the property – a member of the team used a bucket auger to extract 12-inch soil samples from up to five feet below the surface of the ground. Thirty-five such samples were bagged and taken off the property, along with numerous specimens of vegetation.

Mr. Rapanos was unwilling to give his consent to any of this, at least in the absence of a satisfactory understanding on the standards to be used by the people doing the work. He made his position clear to the DNR team at the meeting on August 22, and he adhered to that position at a meeting he and his lawyer had with Messrs. Harrington and Spencer on August 30.

It was not just a cursory inspection for which consent was being withheld. (There had been many such inspections already, of course.) Rapanos and his lawyer must have known that the DNR officials wanted physical evidence – the taking of soil samples had been discussed as early as March 16, it will be recalled, in the presence of lawyer Allen – and Rapanos and Allen were insisting that the officials get a search warrant before entering the property. Judge Zatkoff ultimately concluded that Mr. Rapanos had a constitutional right to insist on the warrant – and if my understanding of the facts is correct, I think he did too.

III

I agree with my colleagues on the panel that the Salzburg Road property must be treated as "open fields." We are also in agreement, I believe, on the proposition that the open fields doctrine is limited in scope to what can be seen in such fields. See, in this connection, *Allinder*

v. State of Ohio, 808 F.2d 1180, 1184-86 (6th Cir. 1987), and the cases there cited. The open fields doctrine does not give the government *carte blanche* to mine evidence from beneath the surface of the fields. Yet here the jury heard extensive testimony about the taking of soil borings, and the jury could fairly have inferred that this was one of the things to which Mr. Rapanos and his lawyer were unwilling to agree. I have no doubt that Judge Zatkoff drew such an inference.

The cross-examination to which Mr. Rapanos was subjected is far too long to be set forth in its entirety, and the passages excerpted in the majority opinion give an accurate sense of what the prosecutor was up to. One further passage may be of interest, however:

"Q. What were you trying to hide?

A. I'm sorry?

Q. What were you trying to hide?

A. Nothing. I'm just following orders.

Q. Who is the boss, you or Mr. Allen?

A. In that respect, Mr. Allen.

Q. So you and Mr. Allen were trying to hide something?

A. No."

This exchange appears in the transcript only a page or two after the prosecutor attempted to establish that Mr. Rapanos understood that the purpose for which the DNR team had gathered at the site on August 22 was to perform a wetland delineation forthwith.

The district court's published opinion on the granting of a new trial speaks for itself, and I shall not attempt to summarize the opinion here. We must not forget the context in which the district court rendered its decision, however, and in this connection it seems to me that the following circumstances deserve emphasis:

- The evidence of the defendant's guilt was far from overwhelming, and the jury's verdict could have gone either way in this case. 895 F. Supp. at 169-70.

- At one stage in its deliberations the jury even reported a deadlock, "with several people on each side that say they won't change their minds." *Id.* at 170.

- Although the defendant was not entitled to an acquittal on the basis of prosecutorial misconduct (among other things, the defendant had objected to being likened to the devil and to having his treeless property compared to the Warsaw ghetto without Jews), there was certainly "prosecutorial overkill" in this case. *Id.* at 169.

A circumstance not mentioned by the district court, but one that strikes me as significant, is that the jury heard a great deal about Mr. Rapanos attempting to hide the findings made by Dr. Goff on the extent to which there were wetlands on the Salzburg Road property. I do not mean to suggest that the prosecutor was guilty of any impropriety in this connection. I do think, however, that the Goff situation was likely to have lent particular bite to the cross-examination of Mr. Rapanos about what he was trying to hide by refusing to let a DNR team enter his property.

I am far from sure, based on what I have been able to read, that I would have granted a new trial had I been in Judge Zatkoff's shoes. But I was not in his shoes. For reasons indicated above, I know less about the case than Judge Zatkoff did. And whether Judge Zatkoff was right or wrong in his assessment of the interest of justice, I am not persuaded that he abused his discretion in making the judgment call he did. I would let the order for a new trial stand.

No. 95-2169

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. JOHN A. RAPANOS, Defendant-Appellee.	)	ORDER (Filed Aug. 4, 1997)

BEFORE: LIVELY, NELSON, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Nelson would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN A. RAPANOS,

Defendant.
_____/

CASE NO. 93-CR-20023.DT
HON. LAWRENCE P. ZATKOFF

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 3rd day of August, 1995

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on the defendant's Motion for Acquittal or for New Trial. The government has filed a response, to which the defendant has replied. This Court finds that the facts and the legal arguments are adequately presented in the briefs, and that the decisional process would not be significantly aided by oral arguments. Accordingly, the motion before this Court will be disposed of upon the briefs submitted by the parties. *See* E.D. Mich. Local R. 7.1(e)(2). For the reasons set forth below, defendant's Motion for a New Trial is GRANTED.

II. BACKGROUND

Defendant John Rapanos was charged in a four-count Superseding Indictment. Counts I and IV alleged that defendant engaged in the knowing discharge of pollutants into waters of the United States, that is, wetlands located in Williams Township, Bay County, Michigan, in violation of 33 U.S.C. § 1131(a) and § 1319(c)(2) (a); and 18 U.S.C. § 2. Counts II and III alleged that defendant threatened and intimidated a witness with intent to induce the witness to withhold documents from an official proceeding, in violation of 18 U.S.C. § 1512(b).

Following a mistrial declared in July, 1994, the case was transferred to Flint and subsequently retried beginning February 1, 1995. During trial, the Court granted defendant's Motion for Acquittal on Counts II and III. On March 7, 1995, the jury returned a verdict of "Guilty" on Counts I and IV. The instant motion followed.

III. OPINION

A. Applicable Standards of Review

1. Federal Rule of Criminal Procedure 29

Motions for Judgment of Acquittal are brought pursuant to Fed. R. Crim. P. 29. Rule 29 states, in pertinent part:

> **(c) Motion after Discharge of Jury.**
> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is

returned the court may on such motion set aside the verdict and enter judgment of acquittal . . .

Id.

2. Federal Rule Criminal Procedure 33

Fed. R. Crim. P. 33 states, in pertinent part:

Rule 33. New Trial
The court, on motion of a defendant may grant a new trial to that defendant if required in the interest of justice . . . A motion for a new trial shall be made within 7 days after verdict or finding of guilty or within such other time as the court may fix during the 7 day period.

Id.

3. Federal Rule Criminal Procedure 52

Fed. R. Crim. P. 52 states:

Harmless and Plain Error
(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Id.

B. Analysis and Discussion

On February 15, 1995, during the defendant's case-in-chief, defendant John A. Rapanos took the stand and

testified in his own behalf. On cross examination, the prosecution, pursuing a line of questioning that addressed the inspection of the property and attempted warrantless entry of the property by Michigan Department of Natural Resources Officers ("DNR") on August 22, 1989, asked Rapanos the following series of questions:

> Q: And this August 30th meeting, again, you had not let the DNR on the property?
>
> * * *
>
> A: He [Jake Allen, Defendant's attorney] told them just point blank, you will not be allowed on the property.
>
> Q: And you agreed with that?
>
> A: He said you cannot go on the property without a search warrant, I think.
>
> Q: And you said the same thing?
>
> A: [nonresponsive]
>
> Q: I would like you to answer the question, though. You also told the DNR that they could not go back on the property without a search warrant?
>
> A: I didn't say those words.
>
> Q: Words to that effect?
>
> A: No.
>
> Q: Since you were certain in your own mind that there were no wetlands there, why not let the DNR on the property?
>
> A: It's not my decision.
>
> Q: Were you practicing concealment again?

A: They could get a search warrant, Miss Parker, and they could go out there the next day if they wanted to. We couldn't stop them, okay. There's no concealment. They know the procedure. First of all, they were trespassing on our property. Jake was very upset about that. He said, look, you don't go on any of our properties ever again. Don't you dare go on there without our permission or a search warrant. That's what was said [at] that meeting.

Q: So were you practicing concealment, or not?

* * *

Q: So you weren't willing to say, don't worry, I have nothing to hide, let them on?

A: I don't think that ever came up.

Q: All right. And as a client, you have the ability to do that; right? To say to your attorney, look, go ahead, let them on.

A: I learned a long time ago, that if you don't take your attorney's advice, you shouldn't have him. . . .

Q: So the bottom line is, though, you knew that you could talk to him about that and try to convince him to do that and you chose not to?

A: It didn't happen.

Tr. Feb. 15, 1995, pp. 95-97. *See generally* pp. 87-98.

At the time of the cross examination, the Court was deeply concerned about the prejudicial effect of such questioning, finding it akin to comments regarding a defendant's silence following *Miranda* warnings. The

Court was prepared to offer a curative instruction, however, the questioning proceeded without objection from the defense.

During the course of the trial the objections from each side had been so numerous, that, when defense counsel failed to object, the Court was loath to interfere. It was the perception of the Court at the time that the decision not to object must have been strategic, and it is generally the Court's policy to allow attorneys latitude in the manner of presentation of their cases. Upon consideration and review, the Court finds that it was plain error to allow the discourse to continue.

The Court is aware that "[t]o be plain, an error must be conspicuous, at least in hindsight." *United States v. Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111, 105 S.Ct. 792 (1985). The Court further recognizes that the "plain error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046 (1985). While Fed. R. Crim. P. 52(b) is primarily a tool of appellate courts, used to review issues first raised on appeal, the Court notes that Rule 52(b) is not limited by its terms to such application.[1]

The Supreme Court has addressed cases in which the defendant was severely prejudiced by comments and

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[1] Although, the Court does note that a District Court is prohibited from utilizing the "plain error" standard in a *collateral* attack on an original criminal trial. *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584 (1982).

arguments relating to his exercise of his Fifth Amendment right to refuse to testify, or to remain silent following advisement of his *Miranda* rights. *See, e.g. Doyle v Ohio,* 426 U.S. 610, 96 S.Ct. 2240 (1976); *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229 (1965). Similarly and more recently, courts have applied the "plain error" standard to comments and arguments addressing a defendant's refusal to consent to a warrantless search. *See e.g. United States v. Mazzone,* 782 F.2d 757 (7th Cir. 1986); *United States v. McNatt,* 931 F.2d 251 (4th Cir. 1991). Particularly instructive is *United States v. Thame,* 846 F.2d 200 (3rd Cir. 1988), *cert. denied,* 488 U.S. 928 (1988).

In *Thame,* the prosecution argued to the jury that the defendant's refusal to allow a full search of his luggage was evidence that he knew the bag contained cocaine. *Id.* at 205. The *Thame* court reasoned that the prosecutor's argument – which suggested that exercise of the fourth amendment right to be free from warrantless searches was evidence of guilt – was similar to (1) the comments regarding a defendant's silence as evidence of guilt, challenged in *Griffin, supra,* and (2) comments regarding a defendant's exercise of the sixth amendment right to counsel as evidence of guilt. *Id.* at 206; *see United States v. McDonald,* 620 F.2d 559 (5th Cir. 1980). For the limited analysis involving prosecutorial comment, the *Thame* court "[saw] little, if any valid distinction . . . " between comments regarding the exercise of Fourth, Fifth or Sixth Amendment rights. 846 F.2d at 206. This Court agrees.

The *Thame* court concluded that, on the specific facts in question, the comments did not rise to a constitutional dimension, and did not constitute "plain error." *Id.* at 207. This Court notes that aggravating factors exist which

both distinguish the instant case from *Thame*, and also make it more troublesome.

First, in the case at bar, the prosecution's questions were asked in the midst of the taking of evidence from the defendant himself, a critical portion of the trial. The comments were not made during opening statements or closing arguments, about which the jury is always admonished that "the attorneys comments are not evidence." Rather, the defendant himself was forced to defend his exercise of his constitutional right. In fact the questioning concluded with the defendant being asked *why he hadn't convinced his attorney* that he should waive his Fourth Amendment right. In *Doyle, supra*, the Supreme Court reversed and remanded where the prosecutor asked the defendant to explain his silence at the time of arrest. 426 U.S. at 613-16; 96 S.Ct. at 2243. In addition to the questions, the prosecution insinuated through questions, if not argued, that when the defendant refused to allow DNR officers onto his property on August 22, 1989, he was concealing evidence.

Second, although the trial was particularly hard fought, often contentious, and at some times bitterly disputed, the comments were not followed by an objection. Had the defense objected to the first questions, the Court would have had the opportunity to admonish the prosecution, instruct the jury of the impropriety of such questioning, and reduce the danger of prejudice. Instead, the line of questioning continued for several minutes, consuming more than ten pages of transcript. *See* Tr. Feb. 15, 1995 pp. 87-97. In the hindsight afforded by Rule 52 review, it is clear that the questioning infringed upon a protected right, and that the Court must intervene.

Moreover, the Court is particularly concerned about the effect of the questions in light of the context of the trial and the zealousness with which the prosecution pursued its case. In his motion, defendant has argued that he is entitled to acquittal based upon prosecutorial misconduct.

In his Motion for Acquittal, defendant objects to references to the devil made by the prosecution in its closing argument quotation from *A Man for All Seasons;* to a half-completed and ill-conceived comparison of viewing the Salzburg Road property without trees to viewing the Warsaw ghetto without Jews; to an insinuation that defense counsel asked a witness to alter a report; and to what defendant perceived as the prosecution's attempt to paint the use of a "strawman" in real estate transactions as an unethical practice.

The prosecution responds that "prosecutorial misconduct warrants reversal of a conviction only if, based upon a review of the record as a whole, it 'permeates the entire atmosphere of the trial' " Resp. Br. p. 9 (citing *United States v. Dandy,* 998 F.2d 1344, 1352 (6th Cir. 1993)). The prosecution also contends that its comments, in general, were fair comments on the credibility and motivations of the witnesses, based on the evidence of record.

While the Court does not perceive the actions in question as rising to the level of prosecutorial misconduct,[2] the Court would characterize it as "prosecutorial

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[2] The Government correctly argues that the standard for prosecutorial misconduct is very high, and that "a criminal conviction is not to be lightly overturned on the basis of the

overkill."[3] The Court also notes that the defense stretched the boundaries of courtroom civility. However, in such an emotionally charged situation, the Court must be more concerned about – and vigilant of – the damage caused by a remarks or questions which it perceives as crossing the line.

Finally, the Court is particularly concerned that the prejudicial questions regarding defendant's exercise of his Fourth Amendment rights may have had more weight and influence with the jury seated in this matter, than they would have had in other cases. In *Thame*, the Court found that there was overwhelming evidence of the defendant's guilt from which the jury could reach a decision, and therefore the comments were *not* "sufficiently major that a miscarriage of justice will result if the conviction is not reversed." *Thame, supra*, at 207. This Court cannot reach the same conclusion in the instant action.

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prosecutor's comments standing alone, for the comments must be viewed in context. . . . " *United States v. Young*, 470 U.S. 1, 11; 105 S.Ct. 1038, 1044 (1985).

[3] The Court has also considered the doctrine of "invited response," and finds it not applicable. As noted by the Seventh Circuit:

> [p]roperly understood, that doctrine does not condone the prosecutor's descending to the level of the defense counsel or enact the proposition that two wrongs make a right; it merely recognizes that the impact on the defendant from the prosecutor's [misstatements] may be less if the defendant's counsel aroused the jury against the prosecutor.

782 F.2d 757, 762 (citing *U.S. v. Young*, 470 U.S. 1, 12; 105 S.Ct. 1038, 1044-45 (1985)).

It is the opinion of the Court, after viewing the entirety of the trial, that a reasonable jury could have rendered either verdict. In addition, at one point during deliberations, the jury returned a note that indicated that they were deadlocked, "with several people on each side that say they won't change their minds." In such a situation, an unchecked prejudicial comment may indeed have tipped the scales in favor of conviction.

Accordingly, based on the rationale of *United States v. Thame*, and after careful consideration of the factors unique to this action, the Court finds that, pursuant to Rule 33, the interest of justice requires that defendant be given a new trial. Therefore, defendant's Motion for New Trial is GRANTED.

Case law is clear that a Motion for Acquittal is not to be granted in order to "punish" the prosecution. Moreover, the Court finds that the prosecution did not engage in misconduct. Defendant's Motion for Acquittal is therefore DENIED, as the prejudice visited upon defendant can be remedied at trial.

IV. CONCLUSION

For the reasons stated above, defendant's Motion for Acquittal is DENIED. Defendant's Motion for a New Trial pursuant to Fed. R. Crim. P. 33, is GRANTED.

IT IS SO ORDERED.

/s/ Lawrence P. Zatkoff
Lawrence P. Zatkoff
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN A. RAPANOS,

Defendant.

CASE NO. 93-CR-20023-DT
HON. LAWRENCE P. ZATKOFF

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 20th **day of** September 20, 1995.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

This matter is before the Court on plaintiff's motion for reconsideration of the Court's August 3, 1995, Memorandum Opinion and Order in which the Court granted defendant's motion for a new trial. Pursuant to the Court's August 21, 1995, Order, defendant has filed a response to the motion for reconsideration. For the reasons that follow, plaintiff's motion for reconsideration shall be denied.

I. THE LAW

Under E.D. Mich. LR 7.1(h), which applies in criminal cases pursuant to E.D. Mich. LR 247.1(a), a motion for reconsideration (1) must be filed no later than 10 days after entry of the challenged order, (2) must not present the same issues previously relied upon, and (3) must demonstrate a palpable and outcome-determinative defect by which this Court and the parties were misled. Plaintiff's motion for reconsideration was timely filed.

II. ANALYSIS

In the August 3, 1995, Memorandum Opinion and Order, the Court granted defendant's motion for new trial on the ground that certain questions asked by the plaintiff on cross-examination constituted an impermissible comment on defendant's Fourth Amendment right to refuse consent to a warrantless search of defendant's Salzburg Road property.

The plaintiff attacks the Court's decision on five grounds: (1) that the defendant enjoyed no constitutional right to insist upon a warrant as a condition of entry; (2) that the cross-examination was both relevant and proper; (3) that the testimony was proper impeachment; (4) that the testimony was admissible as evidence of consciousness of guilt; and (5) that Court erroneously interpreted the case law relied upon in its Memorandum Opinion and Order.

As to grounds (1), (2), and (5), the Court finds no reason to reiterate the analysis and rationale set forth in the Court's August 3, 1995, Memorandum Opinion and

Order. Therefore, the Court denies grounds (1), (2), and (5) of plaintiff's motion for the reasons set forth in the August 3, 1995, Memorandum Opinion and Order, as well as for the reasons cited in defendant's response to plaintiff's motion for reconsideration.

Grounds (3) and (4) of plaintiff's motion are also denied. In ground (3), plaintiff argues that it had a right to impeach the defendant, and the Court agrees. Most of plaintiff's argument regarding impeachment involves cross-examination not challenged by the defendant or questioned by the Court. Plaintiff unquestionably had a right to impeach defendant regarding whether defendant: a) had ever had wetlands on one of his parcels of land; b) had ever dealt with the DNR regarding the issue of wetlands or applied for a permit from the DNR; c) knew what wetlands were; or d) knew what the definition of a wetland was. In fact, plaintiff even had a right to impeach defendant regarding defendant's contention that he was very cooperative with the DNR. However, plaintiff had no right to do so by attacking defendant for exercising his Fourth Amendment right to prohibit plaintiff from entering defendant's property without a search warrant. The absence of authority in support of plaintiff's position speaks volumes about the validity of that position.

Finally, ground (4) is contingent upon the Court holding that defendant had no Fourth Amendment right which could be infringed. However, as the Court has held, defendant did have a Fourth Amendment right to prevent plaintiff from entering his property without a search warrant. As such, plaintiff's arguments set forth in ground (4) are not persuasive.

III. CONCLUSION

For the aforementioned reasons, the Court finds that plaintiff has not demonstrated a palpable and outcome-determinative defect by which the Court was misled. Accordingly, plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED.

/s/ Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: September 20, 1995

Trial Transcript Harrington

2-1-95
P. 158, 167, 178

[p. 158] Mr. Rapanos indicated his attorney wasn't there. We had several people from the Department, he was outnumbered. He indicated that he'd hired and fired three wetland consultants, they wouldn't get him a good determination. He planned on farming the site, and that we couldn't get on the site to do an evaluation, but that he would meet with two of us once he got his attorney, and we could set up a meeting in his offices.

Q. Were you asking at that time for permission to go on to the site and take a look around?

A. If we could get on the site, we had people there that were knowledgeable in plants and soils.

Q. What would have been your purpose in going on to the site?

A. To attempt to verify that the unauthorized activities had occurred, and the extent and location of them.

* * *

[p. 167] I asked him if we could get on-site to do a wetlands evaluation, and he said, no, you cannot get on-site, because there's no wetland on-site.

And my question then to him was so what, you're telling me that if, in fact, we want to get on-site, we have to get a search warrant? And he said, that is correct. I asked him where he wanted the search warrant served if, in fact, we got one, and he said serve it on this office.

[August 30, 1989]:

Q. And, again, Mr. Rapanos would not let you on the property, is that right?

A. It was private property. That's what he indicated, yes, sir.

Q. Have you ever received a consultant's report from Mr. Rapanos regarding where the wetlands were on the property?

A. To my knowledge, no.

Q. After Mr. Rapanos had indicated that he would not allow

* * *

[p. 178] A. Yes. On the north end of the property was water outside of the highway right-of-way fence, and in that muddy turgid water were carp. They were – typically you'll find carp spawning in streams in the May/June timeframe.

* * *

Trial Transcript Spencer

2-2-95
P. 112

[p. 112] We had intended on doing a wetland determination at the time of the meeting, however, we were refused access to the property. And the other thing I recall from the meeting was that Mr. Rapanos stated that he had placed fill sand on the property at the advice of a forester, because his intention was to plant pine trees on the property.

Q. Who was there besides yourself and Mr. Rapanos?

A. Chuck Dodgers, Hal Harrington from the Department of Natural Resources, Peg Bostwick from the Department of Natural Resources.

Q. So the people from the Department of Natural Resources would have included Chuck Dodgers, Hal Harrington, and Peg Bostwick?

A. And Richard Sikkenga, he was there as well.

Q. And Richard Sikkenga. You indicated that you had been planning at that point to go on to the property and basically do a determination as to whether there was fill in the wetlands, is that what you're saying?

A. That's right.

Q. What did Mr. Rapanos say?

A. Mr. Rapanos said that the property did not need protecting, and he refused to let us on to the property.

* * *

* * *

Trial Transcript Dodgers

2-7-95
P. 73-74

[p. 73] Q. What did you do?

A. I primarily assisted the soil scientists in the evaluation of the condition of the soil, to go over the property, and basically to assess how much sand overburden was placed on the original soil. And also the soil scientists would then pull a sample from below the sand and identify whether that soil would by hydric.

Q. When you say "hydric," what do you mean by that term?

A. It's a term used to describe soils that are wet. All wetland will have a hydric type soil, H-Y-D-R-I-C.

[p. 75] Q. Would that include looking at the soil to make a judgment as to whether or not it was a hydric type soil?

A. Yes, primarily you are looking at the chroma of the soil in the root zone. To determine if it's a low chroma, you may look for the extent of mottling which is caused by oxidation of minerals once the soil does get an occasion to dry up.

Q. You used the word chroma. What does that word means?

A. Chroma is like the measure of dullness or brightness of the soil.

Q. You also used the word mottling. What does mottling refer to?

A. Mottling is when the minerals within the soil are an iron or magnesium. Once they oxidize, they may form little bright colored spots within the soil.

Q. Mottling is how the soil appears in terms of having colorations or spots in it?

A. Yes.

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Trial Transcript Kroel

2-7-95

P. 206-207

[p. 206] Q. Now, did you take soil samples on Mr. Rapanos' property on November 7, 1989?

[p. 207] A. Yes, I did.

Q. And if you could just explain when you would take a soil sample, how would you do it? What are we talking about? What tool did you use?

A. I had a bucket auger which is about a three-and-a-half-inch-round cylinder. It's five feet long, and you push it into the ground, and turn it at the same time, and you pull out cores, and you just continuously do that.

Q. And so you would use this. When you say, a bucket auger, is it like a long cylinder, like a postal digger?

A. The cylinders were a foot high, and it's just a metal rod coming up like a metal pipe with a handle on it, and you just turn it.

Q. How deep can that dig?

A. That one could dig to five feet.

Q. When you took your samples, you indicated you were looking for hydric soils?

A. It is the presence of hydric soils, yes.

Q. And so when you took a typical sample, how would you go about it, and what would determine whether you thought you had taken an adequate sample?

A. We would, or I would, dig down until I thought that I had – well, I would dig down usually pulling out several cores and examine each core that came out. We took the sample. We bagged a sample when we got to the point that I determined that [p. 208] it would be hydric or not hydric, one of the two that was the characteristics exhibited.

Q. How far deep were you trying to go?

A. We would go as deep as five foot.

Q. And you say you get to a certain point where you could determine whether it was a hydric soil or not a hydric soil?

A. Yes.

Q. Would there be any common denominator as to how deep that would be?

A. No, there was nothing that was consistent.

Q. What would determine that?

A. We are trying to look right below the original surface which would be the area right below the blackest layer. That is the indication of if the water was up to that line, then usually that meant that the water came up, which right – which was right below the surface, so we tried to get right into that zone right below. I want to call it an "A" layer, an "A" horizon where all the root masses, and that's what I try to key in on.

Q. Now, did you see, when you were on the property, did you make any distinction when you were taking your samples between the original soil and any fill that was placed on top of it?

A. We listed any fill that was there.

Q. And did you see fill on the property that day?

A. Yes, I did.

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Trial Transcript Kroel

2-8-95
P. 22

[p. 22] Q. Well, were you interested in the hydrology?

A. Somewhat. More, I was interested in the hydric soils. The hydrology showed itself with the water table.

Q. At least at the time that you were there?

A. That's right

Q. And I take it that the hydrology was important enough that you recorded the existence or absence of hydrology with each soil boring?

A. I did it with the first one, and I don't know what it wasn't done on the others.

Q. That's what I wanted to ask you about. If the hydrology is important, why would you record it was ten inches below the surface on the first hole? Why would you record it was ten inches below the surface on the first hole and totally ignore it from that point on?

A. I don't know.

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Trial Transcript Bostwick

2-8-95
P. 176-177

[p. 176] BY MR. BERG:

Q. Did you have any personal contact with the property owned by Mr. Rapanos?

A. Yes, I did.

Q. When was that?

A. In August of 1989.

Q. And do you remember approximately what date it was?

A. I believe August 22nd of 1989.

Q. What happened on August 22nd of 1989, what did you do?

A. I met on the site with four other staff from the Michigan Department of Natural Resources, and Mr. Rapanos. I was asked to go out to the property in order to look at the site of the, at that time, alleged violation.

Q. Who else was there besides yourself?

A. Hal Harrington, Richard Sikkenga, Chuck Dodgers and Steve Spencer, all of Land Water Management Division, Michigan DNR.

Q. Did Mr. Rapanos make any statements at this meeting on August 22nd of 1989?

A. Yes, he did.

Q. As far as your recollection, what did Mr. Rapanos say?

A. There was extensive discussion on that date. Most of the time I was listening. There had been, obviously, some previous meeting between the other staff there and Mr. Rapanos. Some of it was followup, what it sounded like.

He was very argumentative and unwilling to accept any [p. 177] delineation or mapping of wetland boundaries on the property by our staff. He indicated he felt that there were differences between state methods and federal methods that made it too confusing. There was discussion about that with our staff. Our staff attempted to clarify for him that there was not a great deal of difference, but all he needed to do was to follow the state law. He indicated that was not satisfactory.

He indicated that he had, in fact, hired and fired three wetland consultants to come out and look at the property, but that all of them were biased. He would not accept their findings, because he felt that they were under the influence of the DNR. I believe the phrase he used was under the thumb of the DNR.

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Trial Transcript Sadawasser

2-8-95
P. 223-224

[p. 223] A. In this particular case, this site is – was clearly disturbed. There had been a major disturbance on this site that would essentially obliterate the plants that would have been there, that altered the hydrology, and altered the soil.

Those are the three elements you may recall that I said are needed in order to identify a wetland.

So when they've been altered in this way, you then have to rely on evidence that would show what happened there [p. 224] earlier. That would include such things as aerial interpretations, such things as soil borings, such things as knowledge from other officials that may have been on property at a different time. You draw from all sources that may be available then to determine what had been there.

In this particular case, since it was a matter for enforcement, it was necessary, we believed, to have experts do the gathering of information to help us assemble that. And that surely is the case with the soils, because with the fill on top, it now becomes a question as to whether or nor what was underneath it had been altered as well, whether the original soil could still be determined.

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Trial Transcript Sadawasser

2-9-95
P. 39

[p. 39] categorizations in the Fish and Wildlife categorization system, how many of the plants which you collected on November 7th, 1989, in total, were obligate wetland species?

A. Twenty-three out of the 53 specimens.

Q. And how many were facultative wetland?

A. Fifteen out of the 53.

Q. How many were facultative?

A. Ten.

Q. How many were facultative upland?

A. Three.

Q. And how many were upland?

A. Two.

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Trial Transcript Rapanos

2-14-95
p. 51-56, 94

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[p. 52] Q. Can you tell us what your plan was, if any, with respect to making these windrows. Why were they made?

A. I was going to load them and haul them away.

Q. What was your plan with respect to loading them and hauling them away?

A. Pat's Gradeall was going to load them and haul them to the Midland dump.

Q. Did you direct anybody with respect to where these windrows were going to be made?

A. No.

Q. What is your understanding as far as how those windrows came to be placed where they were placed?

A. It's about as fast as a bulldozer can work effectively and economically.

Q. Did you ever go on the property and indicate to anyone for Pat's Gradeall or anybody else where you wanted these windrows constructed?

A. No.

[p. 54] Q. Was there a point in time when any change was done to these windrows?

A. Yes

Q. When did that occur?

A. Toward the end of April of 1989.

Q. Is that when 3-S Construction began to work?

A. Yes.

[p. 55] Q. (BY MR. WILDEBOER): Why did you decide to go from Pat's Gradeall to 3-S to continue work on this parcel?

A. It's more to the – 3-S did more of that kind of work. I don't know if Pat's did any of that kind of work.

Q. More than what kind of work?

A. Burning and getting rid of the wood.

Q. Your original plan with Pat's Gradeall was not to burn the wood?

A. I was to haul it away.

[p. 56] Q. Do you recall when the burning started?

A. Towards the end of April, pretty much near the end of April.

* * *

[p. 94] Q. They indicated to you that they were going on the property at that time?

A. They had a search warrant, and they were going to break the lock, and I ran right away and got Jeanine (phonetic) and said give them a key. They have a search warrant. Let them go on the property.

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Trial Transcript Rapanos

2-15-95
p. 79

[p. 79] Q. So you and Mr. Allen were trying to hide something?

A. No.

Q. Well, you don't need your attorney to let these DNR people do their jobs, to make the inquiry regarding whether or not there's a wetland.

A. I did need my attorney. It's not on my calendar, I'm at the last minute told go out and meet some DNR people, I can't go, I've got to go, something very important, it's an emergency.

I went out there on the 22nd. I didn't know anything about a meeting, it's not on my calendar, so I go out there.

Q. What would have been the harm to let the DNR people on the property with the team of people that they had assembled for this prearranged meeting so they could resolve the question?

A. That's not what the meeting was about. In terms of harm, I have no idea. I was just doing what Jake said. Jake said, don't let them on the property.

Q. Wasn't the real reason –

A. I'm sorry.

Q. Wasn't the real reason you didn't want them on there was that you couldn't reach an agreement with them as to how the work should be done?

A. I don't recall anything like that.

Q. Isn't that the essence of what you told them, that –

A. I told them what?

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Trial Transcript Government Closing

3-2-95
p. 10 & 11

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[p. 10] That is not accurate. The reason it's not is because John Rapanos didn't just spend a couple of dollars or a $100 for lottery tickets in connection with this possible mall. He spent over $300,000 by clearing that property. That was to make this property more desirable for a site such as a mall.

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[p. 11] If you read the report that was dated January of '89, but the work that was done there was done approximately September 27th or so of '88, that document reads like a blueprint for how to prepare this site to build a mall.

If you read it, you will be able to see that they are talking about whether you can build a basement strip off the top soil and put on six or seven inches of sand, basically preparing the site for the construction of a mall. That is what Mr. Rapanos intended to do with this property, and that is what the evidence says he intended to do. It shows his motive in terms of filling the wetland, that he wanted to get out of it. He was doing it because he was hoping to be a 7.5 owner in the Midland Mall and get almost $1 million for them, property which was otherwise pretty underdeveloped.

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EX. 63